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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. JENNIFER LYNN WYLAM, Defendant and Respondent.	E065408 (Super.Ct.No. RIF078294) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed with directions.

Michael A. Hestrin, District Attorney, and Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Respondent.

Defendant and appellant Jennifer Lynn Wylam petitioned to have her felony convictions for second degree burglary (Pen. Code,[1] § 459) and petty theft with a prior conviction (former § 666) designated as misdemeanors pursuant to the Safe Neighborhoods and Schools Act, enacted by the voters as Proposition 47 in the November 2014 election. The trial court granted defendant's petition. The People appeal, contending that defendant failed to meet her burden of proving eligibility for relief, and that she is not in fact eligible for relief, with respect to the burglary conviction. We find that defendant's petition was properly granted.

I. FACTS AND PROCEDURAL BACKGROUND

On February 19, 1998, defendant pleaded guilty to one count of second degree burglary (§ 459; count 1) and one count of petty theft with a prior conviction (§ 666; count 2), as well as an enhancement for committing the offenses while released on bail (§ 12022.1). The trial court imposed a sentence of two years with respect to count 1, two years with respect to count 2, and two years with respect to the enhancement, but ordered the sentence on count 2 stayed pursuant to section 654, and ordered the sentence on the enhancement to be stricken.

On May 20, 2015, defendant filed her petition for relief under Proposition 47. Plaintiff used the form "[a]dopted for [m]andatory [u]se" by the Riverside Superior Court, checking the boxes describing the two conviction offenses, and the box indicating that she "believes the value of the check or property does not exceed $950." She did not

[1] Further undesignated statutory references are to the Penal Code.

submit any additional supporting documents or evidence. The People's response indicated only that it was "D's burden" to show eligibility. The trial court set the matter for an evidentiary hearing.

At the hearing, held on January 8, 2016, the People opposed defendant's petition. The People submitted police reports related to defendant's convictions, arguing that they showed defendant's convictions were in fact for an "uncharged conspiracy," and that conspiracy is not a crime reduced to a misdemeanor by Proposition 47. The police reports indicate that defendant had entered a department store with a male associate, who took merchandise worth $215 from a display, and gave it to her to present at an open register as a return; defendant then used some of the cash received from the return to purchase a comforter. Defendant stated after her arrest that her associate had asked her to go with him to the store and conduct the fraudulent transaction because he "had refunded too many times already" that month at the same store.

The trial court granted defendant's petition, finding over the People's objection that defendant's burglary conviction would have been misdemeanor shoplifting, in violation of section 459.5, under Proposition 47. The court's order does not explicitly mention defendant's conviction for petty theft with a prior.

II. DISCUSSION

The People contend that defendant failed to meet her burden to show eligibility for relief under Proposition 47, and that in any case she is ineligible for relief with respect to her burglary conviction. We disagree with both contentions.

A. Background Regarding Proposition 47.

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Section 1170.18 provides, among other things, that "persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.'" (*Rivera, supra*, at p. 1093.) The defendant bears the burden of facts and circumstances of the prior conviction to demonstrate eligibility for relief under Proposition 47. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 877.)

Section 459.5, added by Proposition 47, redefines a limited subset of offenses that would formerly have been burglary to be the new offense of shoplifting, committed by "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)

Proposition 47 also amended section 666 to make petty theft with a prior offense punishable solely as a misdemeanor except for certain categories of offenders. (*People v.*

Diaz (2015) 238 Cal.App.4th 1323, 1330.) Nothing in the record suggests defendant falls within those excepted categories.

B. Plaintiff Carried Her Burden of Proof Regarding the Facts and Circumstances of Her Burglary Conviction.

Defendant requested relief under Proposition 47 by checking boxes on a court-mandated form, unsupported by any additional evidence. As such, the trial court could have summarily denied the petition, allowing her to file a new petition attaching "some evidence, whether a declaration, court documents, record citations, or other probative evidence" showing the value of the property at issue, and the circumstances of the burglary. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 141 (*Perkins*).)

The People present no authority, however, in support of the proposition that the trial court was *required* to summarily deny defendant's petition for lack of evidence, because there is no such authority. The trial court was well within its discretion to instead set an evidentiary hearing to establish the facts underlying defendant's convictions and make a decision based on the record thereby created.

The People point out that defendant failed to accompany her petition with any information about "the nature of the property or the nature of her entry that constituted second degree burglary." True enough. Nevertheless, it is defendant's burden to establish the facts and circumstances of her offense, and thus her eligibility for relief, by means of evidence in the record. (*Perkins, supra*, 244 Cal.App.4th at p. 141.) Here, defendant properly demonstrated the facts and circumstances of her convictions by pointing to evidence in the record, namely, the police reports submitted by the People.

The People submitted those documents as substantive evidence of the facts and circumstances of defendant's crimes. There is no reason why defendant could not make use of them for the same purpose, even if drawing very different conclusions from those urged by the People.

Furthermore, the police reports provide substantive evidence, not contradicted by anything else in the record, that the value of the property defendant stole was under $950, and that she entered the commercial establishment where she stole the items during regular business hours, as required to fall within the definition of shoplifting in section 459.5. (§ 459.5, subd. (a).) As noted, the police reports state that defendant entered a department store during regular business hours, and stole $215 by means of a fraudulent return. As such, defendant met her burden of proof with respect to establishing that the value of the property at issue and the circumstances of the offense fall within section 459.5.

C. Defendant Entered the Store with Intent to Commit Larceny.

The People argue that defendant did not act "with the sole intent to commit larceny under $950. Rather, she entered the department store in concert with [an accomplice] with the intent to commit the crime of conspiracy therein." On this basis, the People contend defendant was ineligible for relief under Proposition 47. We find this argument unpersuasive in a number of respects.

First, section 459.5 does not explicitly require that the defendant must have the "sole intent" of committing larceny, as the People read it. Rather, the statutory language requires only that the defendant have the "intent to commit larceny." (§ 459.5.) The

circumstance that a defendant might also have been harboring other intents, criminal or otherwise, is irrelevant.

Second, we doubt that the facts described in the police reports in this case would support a charge of burglary based on entering the store with intent to commit conspiracy. Defendant and her accomplice did not enter into the store to conspire to commit a crime; rather, the evidence suggests that defendant entered the store to complete a crime that she and her accomplice had conspired elsewhere to commit. It is possible to imagine a burglary based on intent to commit conspiracy after an entry—a pair of outlaws, breaking into a building to find a quiet space to plot their next nefarious deed, perhaps. The People have pointed to no authority discussing such a hypothetical burglary, however, and we are aware of none.[2]

Third, in this case, there has already been a specific judicial finding that plaintiff's intent and objective in committing the burglary was intent to commit larceny. By staying defendant's sentence on count 2, petty theft with a prior, pursuant to section 654, the trial court implicitly made the factual finding that defendant harbored the same intent and objective for both offenses. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162 ["'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced.'"].) The

[2] Certainly, conspiracy to commit burglary is a felony that was not reduced to a misdemeanor by Proposition 47, as the People point out. No such conviction, however, is at issue in the present case.

idea that defendant harbored a criminal intent separate and distinct from the intent to commit petty theft, a form of larceny, is not compatible with the trial court's finding, which the People did not appeal.

Fourth, the People's argument raises the obvious question, conspiracy to do what? In this case, it is indisputable that the uncharged conspiracy at issue was a conspiracy to commit larceny. The People's notion that intent to conspire to commit larceny is not itself a species of "intent to commit larceny" in the meaning of section 459.5 is unpersuasive.

Fifth, after the issuance of the tentative opinion in this matter, but prior to oral argument, this court published its opinion in *People v. Huerta* (2016) 3 Cal.App.5th 539, rejecting the People's argument on analogous facts. We agree with the analysis expressed in *Huerta*.

For all of the above reasons, we agree with the trial court's rejection of the People's arguments, and find that defendant's petition for relief under Proposition 47 was properly granted.

D. Both of Defendant's Convictions Should Be Designated as Misdemeanors.

Although not raised by the parties, we note one apparent clerical error. Defendant's petition was unambiguous in seeking designation of both count 1 and count 2 as misdemeanors, and defense counsel was similarly unambiguous at the evidentiary hearing. The People raised their objections to redesignation with respect to the burglary count, and the trial court explicitly rejected those objections. The trial court's minute

order, however, only states that "Count (s) 001 is now deemed a misdemeanor pursuant to PC 1170.18," and states no explicit ruling regarding count 2.

The People have presented no reason, either on appeal or in the trial court, why defendant's petty theft conviction should not be reduced to a misdemeanor pursuant to Proposition 47. The offense has been reduced to a misdemeanor, except for certain ineligible defendants. (§ 666.) And the trial court's ruling with respect to count 1 reflects an implicit finding, which the People have never contested, that defendant is not within any of the categories that would render her ineligible for relief. We conclude that the trial court's failure to address count 2 in its order was a clerical error; that the trial court, by rejecting the People's objections, intended to grant defendant's petition in its entirety, and the failure of its minute order to reflect that intention is a clerical error.

Generally, a clerical error is one inadvertently made. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808.) Clerical error can be made by a clerk, by counsel, or by the court itself. (*Ibid.*) A court "has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts." (*In re Candelario* (1970) 3 Cal.3d 702, 705.) Accordingly, in the interest of clarity, the superior court's minute order granting defendant's petition should be modified to explicitly state that counts 1 and 2 are both designated as misdemeanors pursuant to § 1170.18, subdivision (f). We therefore will direct the superior court clerk to generate a new minute order reflecting both those redesignations.

III. DISPOSITION

The order appealed from is modified to expressly state that counts 1 and 2 are both designated as misdemeanors pursuant to § 1170.18, subdivision (f). The superior court clerk is directed to generate a new minute order reflecting both these redesignations. In all other respects, the order appealed from is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.